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THE MALABAR MARRIAGE BILL.*

Thanks to the labours of the Select Committee, the Malabar Marriage Bill has been greatly improved. The original bill was so full of shortcomings in matters of principle, and in the language of the draftsman that it must have caused the Select Committee a great deal of labour to put it into a decent shape. Nothwithstanding the apparent care that has been bestowed upon it the difficulty of legislation on the marital relation and its consequences as affecting the conditions of a society, very much at variance with one of which marriage forms the basis, is manifested in several sections of the bill. The Law regarding marriage is essentially a personal Law and legislation upon such a subject properly belongs to the Imperial Legislature so that wherever he goes a man may carry his law with him. No doubt there is difficulty in the particular case of the people of Malabar. The difficulty of the Imperial Legislature grappling with the problem would be great, but would certainly not be insuperable; for persons specially conversant with the subject might be added to the Imperial Council to assist in the birth of the new Legislation. The Local Legislature can only legislate for the province and the restriction thus imposed upon its legislative capacity seriously affects the nature of the legislation. The new Law is made applicable to Hindus in the Presidency of Madras following the Marumakkatayam or the Aliasantana Law of Inheritance. There are such Hindus in the Presidency of Bombay. A Hindu of this province following the Marumakkatayam Law may by the exigencies of his calling be resident in the province of Bengal. It is highly inconvenient that the Marriage Law should be inapplicable to the former and that it should be altogether impracticable

* This article was in type before the meeting of the Legislative Council on the 25th February and a summary of it appeared in the *Madras Mail* of the 25th February.

for the latter to elevate his sambandham into a marriage at the place where he resides by reason of the absence of the machinery for registration. Even at this moment after the bill has undergone full discussion in Select Committee and in the public press and the crudities of its original shape have been rubbed off, it may not be inexpedient for the Imperial Legislature to take up the bill and pass it into law. But we cannot hope for such a contingency.

The bill, in its original shape, was liable to one serious objection which the rare judgment of the Honourable Mr. V. Bhasyam Aiyangar has succeeded in removing. The objection was so serious that it might well have endangered the passing of the measure itself. The Honourable Mr. Sankara Nair was not the first to conceive a Marriage Law for Malabar. But he has vindicated the usefulness of his presence in the Legistative Council by introducing the measure. Nobody ever supposed that a marriage Law which was a desideratum for a society without it, entirely secluar and without any religious formalities, should be imposed upon a religious people who had a religious form of marriage to which they attach the highest importance. But in the bill of Mr. Sankara Nair, provision was made for the sambandham of a Nambudri brahmin or a Pattar of the East Coast, as he is called, with a Nair woman, being registered as a marriage. The plausible argument in support of this is that there are such sambandhams in Malabar, and it is necessary in the interests of morality that this enabling Law should apply to them as well. The women of the families of the Rajas of Malabar contract such alliances with Nambudri brahmins and the women of the houses of several Sthanies have also a preference for such alliances and if facilities are not created for their being registered as marriages, the women of rich and influential houses would occupy a socially inferior status. It is also urged that if a Brahmin has no objection to consort with a Nair woman and is willing to have himself registered as husband, it is not for the society at large in this age of reform to cry out against individual predilections. This age of reason, civilization and progress is invoked in justification of the legislation.

But what apparently has been lost sight of by the advocates of such a view is that in their apparant desire to encourage indi-

vidual freedom they are invading the freedom and trampling down the religious beliefs of the majority of the people. Freedom of action for one, cannot be allowed, if it interferes with the freedom of action of others. If the Brahmin party to a sambandham were alone in the world without any ties of blood relationship to others, there would be good justification for the proposal. But what right has a young scapegrace breaking loose from the bonds of caste and from the restraints of his home to contract an alliance with a woman who cannot be a member of his household, whose society he cannot inflict upon his relations and in whose favour he cannot create claims for maintenance or inheritance upon other members of his family who had no voice in the selection of a woman of inferior caste as his spouse? With what justice can we advocate the individual freedom of the young brahmin boy to choose a Nair wife when at the same time we curb the freedom of his father and his mother and other persons near and dear to him by compelling them to provide maintenance for his wife out of the family property or to pass their property in succession to children born of such an alliance? It is a strange marriage indeed where the wife cannot claim to live with the husband and it is pollution for him to touch her. People in this conservative country are not quick to realise the effects of insidious changes, but if the consequences of this law were explained to the people, a chorus of indignation would swell from every side. The people of the Districts outside Malabar or even the brahmin inhabitants of that district have never troubled themselves about this new legislation for the followers of Marumakkatayam Law as they conceive it. But if the matter were once explained to them and they were enabled to realise the consequences of this legislation at the instance of Mr. Sankara Nair, we have no doubt as to the fate of this measure. Fortunately, however, better counsels have prevailed. At the instance of Mr. Bhashyam Aiyangar a clause has been introduced in S. 3 and also in S. 15 which has effectually removed the danger that was in store in consequence of the provision of S. 3 as to the creation of the marriage tie between parties both or *either* of whom follow the Marumakkatayam Law or the Aliasantana Law. The Honourable Mr. Jambulinga Mudaliar dissents from the conclusion of the majority of the select committee in this respect and although he is willing to tolerate

clause (*a*) in section 3, he is strongly opposed to the similar clause in section 5. Although he would not object to a prohibition against the registration of a marriage where one of the parties has a personal Law of marriage opposed to a union with the other party he would not invalidate the marriage after it had taken place. We are unable to follow his reasoning. The cry of social reform has blinded its adherents to the perception of the mischief of a Law which at one stroke tramples down the religious susceptibilities of a whole people.

In addition to the grave impolicy of legislation of this kind, there is a legal difficulty as to the competency of the Local Legislative Council without the express sanction of the Government of India to legislate upon a question affecting the religious usages of a people. When Mr. Sankara Nair's application for leave to introduce a bill regarding marriage in Malabar was submitted to the higher authorities there was no intention on the part of the Local Government of undertaking legislation on a secular basis for anybody that had a marriage Law already or for introducing a novel conception of a marriage relation terminable at the desire of either party among a people to whom marriage was a sacrament and the tie indissoluable until the death of the wife, thereby weakening the foundations of morality among them and undermining the beliefs and associations which cling round a ceremonial of a sacred character. This aspect of the measure would have wrecked it completely if Mr. Sankara Nair had adhered to his resolution of making the Law applicable even when one of the parties had a personal Law of marriage opposed to union with a Nair or Thia woman. Mr. Sankara Nair has wisely resiled from his orginal position and has thereby rendered it possible for a useful measure being added to the statute book.

There is another matter, however, of great importance in which the Bill even as it has emerged from the hands of the Select Committee appears to us to be liable to serious objection. It is a surprise to us that it has not occurred to the social reformer that the bill sanctions polygamy and expressly legislates for the marriage of infants. We cannot understand why, in enacting a marriage law for a people who have it not, the bill should sanction the marriage of infants or the marriage of several wives. Under the bill, as it

stands, a girl of ten may form a sambandham with a boy of twelve and have it registered as a marriage and a sudra boy of the East Coast who has a wife married to him according to the rights of the marriage Law obtaining in the East Coast may form a sambandham in Malabar and add another wife by registering it. Polygamy no doubt obtains in this country and is not prohibited by law or custom. But when a new form of marriage is enacted, the question arises why the advantages of this new privilege should be enjoyed by people who transgress our notions of propriety and decency, by embittering the married life of a woman already wedded to him. It seems to us therefore that in clause (c) of section 3 and clause (c) of section 15 words to the following effect should be added, namely, "or with whom he or she has been otherwise lawfully married." Another clause should also be added to section 3 that of the parties to the marriage the male should be of the age of eighteen years or upwards and the female of the age of fourteen or upwards.* We are not for raising the legal marriagable age of girls to 18, for, that limit does not obtain even in England and the conditions of the country which fit the girls for sexual society at a much earlier age should not be overlooked.

The definition of the term "children," though it bears the mark of considerable reflexion, is not satisfactory. We do not think it was ever contemplated that the children born to a man by a sambandham which does not ripen into a marriage should have rights of inheritance merely because a later sambandham of his has been registesed. Nor do we think that the illegitimate children of a woman born during her married state should be capable of rights of inheritance equal with the legitimate children. These contingencies are possible if the present definition is allowed to stand. It may perhaps have been intended that the children of a woman by any sambandham prior to her marriage should be on the same footing as the children of the marriage, but it seems to us that it will be a distinct encouragement to the registration of sambandhams as marriages if only the children of sambandhams that are registered are recognised as falling within the scope of the definition. We hope the definition will be changed so as to obviate the difficulties we have pointed out.

* The rejection of this amendment is much to be regretted.

We see no justification for the retention of clause (*e*), as regards the customary ceremonies of sambandham, for we believe that there are no ceremonies which are of a binding character. There may be particular forms observed here and there in Malabar, but they have no more virtue in them than the forms of fashions in society. It is inadvisable to elevate them into conditions of the validity of sambandhams or marriages when they are neither precise nor desirable. It seems to us to be an altogether futile and perhaps even a mischievous inquiry for the Court to determine the particular forms in vogue in a village or hamlet. We would therefore strike out clause (*e*) from section 3.

Among the persons entitled to object to the registration of a sambandham should be included the manager of the family to which either of the parties may belong in addition to the manager of the tarwad. If the marriage of a Brahmin with a woman following the Marumakkatayam Law is treated as invalid, the invalidity should not come in as a surprise upon the parties to the marriage after the alliance has been contracted, but opportunity should be given to the manager of the Brahmin's family to apprise the other party of the objection and prevent the registration before it is effected. The word " or families " should be inserted after " tarwads " in clause 1 of section 7.

Among the places where a sambandham may be registered should be included the place where either of the party resides at the time of the application for registration. It ought to be provided in section 16 that registration in a locality other than that designated by the Act is no ground for invalidating the marriage; and this will be secured by the insertion of the fig. 9 before " 11 " in clause 1 of section 16.

We think the form of divorce prescribed by the Act is on the whole satisfactory. While a *locus penitentiac* is given to the applicant by the six months interval before actual dissolution after the date of application, it is necessary that a further application should be required before the dissolution is effected, from the party who had applied for it in the first instance. In the matter of divorce it is desirable that the party seeking it should manifest a certain amount of earnestness more than is implied in the party applying for it.'

The Bill makes provision for compensation in the shape of maintenance being given to the wife after divorce where the husband was at fault. This provision must act as a check upon indiscriminate divorce of the wife by the husband and is a reasonable provision for the wife who will suddenly find herself cast adrift into the world. We think there should be reciprocity in a matter of this discription, more especially in these days of equality of rights. And if the wife was in the wrong in seeking divorce from the husband, she should be made to pay him compensation out of her separate property, if any. We are not unaware of the fact that the provision for the wife may be regarded as the continuation of the maintenance during good behaviour which the husband was bound to make during her association with him and, that the law does not provide for an incapable husband being maintained by the wife. We prefer to regard the provision made for the wife after divorce as a compensation for thoughtless divorce on the part of the husband, and the reason for this holds good where the husband is recklessly rejected in favour of a more handsome or richer individual. If some sort of check is desirable against unlimited freedom of divorce, it is desirable as well against the wife as against the husband. Unless the provision we suggest is added, one of the strongest motives for the permanency of a union will have been taken away.

The provisions of the Bill as regards inheritance require some modification. We think it is due to an oversight that the husband is not included among the heirs to the separate property of the wife. The language of sections 23 and 24 ought also to be improved by substituting the words " a male person " and " a female person " for the words " husband " and " wife ". For the terms husband and wife are relative and therefore imply that a rule of succession is provided only where a person dies leaving a wife or husband, but not where the husband or wife has predeceased the person. This was evidently not the intention of the framer of the Bill or of the Select Committee; but unless the modification suggest- is adopted, the danger of the construction we have placed cannot be avoided.

We hope that this measure calculated to promote the interests of morality in Malabar, necessary, if only for the protection of a

small fraction of Her Majesty's subjects in one of the most sacred relations of life will not be endangered by a desire, on the one hand, to make it as far reaching as possible, or on the other, to preserve as an object lesson for the edification of humanity a stage of society apparently primitive in some respects, but capable of great enlightenment and advancement in civilization. We would strongly urge upon those who regard the tarwad system of Malabar as a great check upon individualism and a bane to social or economic progress, that this humble measure conceived in no spirit of hostility to the tarwad system will in the course of years effectually break up the tarwad and promote freedom of economic developement on every side. To the friends of morality, we would say, that notwithstanding the apparent freedom of divorce and the absence of all form or ceremonial in the creation of the marriage alliance, it cannot but promote the ends of morality as it will preserve the home inviolable by the terrors of the penal law. To the conservatives in all ranks of society, we would say, that this is only an enabling measure, that it does not contravene the caste or religious prejudices of any section of Her Majesty's subjects, that it only adds a legal sanction to the sentiment of society that the union between man and wife should be permanent, and that the march of civilziation and the progress of society will not be content with anything less than a measure which while it leaves everybody inclined to walk in the old paths to continue in his course, enables a person more sensitive to his rights to defend them with success. To the members of Government and to those responsible for the administration of this country, we would point out that the passing of this measure would be a feather in the cap of the local Legislative Council.

THE ANGLO-AMERICAN IMBROGLIO.

The long standing frontier dispute between great Britain and Venezuela has now entered upon an acute stage, owing to the intervention, upon the ground of the Monroe Doctrine, of the United States in a somewhat bellicose spirit, as indicated in the Presidential message and by the appointment of a Boundary Commission—an intervention which threatens to raise complications between the two great English-speaking states, and with which the other powers

of Europe, having relations with the south central American Republics, are not unconcerned. With the details of the quarrel between great Britain and Venezuela we shall not here concern ourselves; for, an examination into its merits would open up a vast field of inquiry depending upon historical research among the buried records of the archives of Spain and Holland. A general outline of the dispute is, however, necessary for the understanding of the issue between great Britain and the United States which is but a sequel to the Anglo-Venezuelan controversy.

Originally Venezuela and British Guiana were Colonies of Spain and Holland respectively. The boundary line between these possessions, while they remained so, was never definitely marked; but the Dutch appear to have extended their sphere of influence some distance up the Orinoco where they established some "forts." In 1796 Great Britain acquired the Dutch territories by right of conquest, and proceeded to lay down a rough frontier line from Point Barima along the alleged Western boundary claimed by the Dutch, and continued for many years to exercise territorial jurisdiction within their area. In 1814, the Dutch by a formal treaty to which Spain was a party, ceded to great Britain their possessions west of the Corentyn River. Upon the foundation of the Venezuelan Republic in 1830 disputes arose with great Britain as to their respective boundaries, and ten years later a conventional line running through the basins of the Cuijum and Guruari was drawn by Schomburgk and called after him. In 1850 the discovery of gold in these regions led to a renewal of the frontier question; and an understanding was come to between the parties to abstain from encroachment upon the debatable area pending a full survey and settlement. Subsequent to this, different lines were suggested by either party but not accepted, and in 1887 Venezuela ceased diplomatic relations with Great Britain. The dispute however went on simmering, and in 1890 and 1893 two other lines were proposed to, but not adopted by, Venezuela. At length, an outrage committed at Uruan on the British frontier police, last year, resulting in a demand of reparation from Venezuela, re-opened the controversy, and led to intervention by the United States. The claim originally advanced by Venezuela embraces the Captaincy-General as existing in 1810, and extending to the Amazon on the South and the Atlantic on the East, but

UNIVERSITY OF CALCUTTA NOT TO BE REMOVED DEPT. OF LAW

she has ultimately abandoned the territory beyond the Essequibo. Great Britain, on the other hand, asserts a right to the area between the Essequibo and the Orinoco, and appears willing to submit to arbitration the regions beyond the Schomburgk line, but absolutely refuses to recognize her claim to the territory within that line as in any way open to dispute.

It must be admitted that the claims of both parties are somewhat indefinite and have not always been consistent. But the actual principle of International Law applicable to the case is not difficult. Great Britain, on the one hand, is entitled by right of inheritance to all the territory which belonged to the Dutch at the time of the cession of the colony by the latter, while Venezuela, on the other, is entitled to the area owned at that time by Spain. But what the area, by metes and boundaries, which belonged to the original holders really was, is the point in question. The solution of this question, which is purely one of fact, seems well adapted for settlement by arbitration.

However, this matter may be ultimately settled, the interference of the United States at this stage has given a new aspect to the controversy, and brings for the first time into direct issue with Great Britain the famous Monroe Doctrine. The question we propose to discuss is whether the United States have any *locus standi* in the Anglo-Venezuelan dispute. It is clear that the action of Great Britain is not in violation of the Clayton—Bulwer treaty, as a writer in the "Fortnightly Review" of December last, erroneously appears to assume. The terms of Article I that "neither will ever erect or maintain any fortification commanding the Nicaraguan canal or in the vicinity thereof, or occupy, or fortify or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America" clearly import firstly, a *permanent* occupation etc., and not a temporary one (as was indeed admitted by the Washington Cabinet with respect to the British occupation of Corinto last year, to enforce the payment of the indemnity due from Nicaragua), and secondly a permanent occupation, fortification or exercise of dominion over any part of Central America *which does not belong* to either party. In the present case Great Britain does not profess to acquire territory *admittedly belonging* to Venezuela, but seeks to enjoy possession of what it deems to be its own. Hence the

Clayton-Bulwer Treaty confers no right upon the United States to interfere. This, indeed, is tacitly acknowledged; for the official ground put forward for intervention by the American Foreign Office is, solely, the exigencies of the Monroe Doctrine. Let us examine this Doctrine and consider its bearing upon the Anglo-Venezuelan question. It was propounded by President Monroe in his seventh annual message to congress on the 2nd December 1823 (*Vide* "Annual Register," 1823, tit. Public Documents pp. 184, 193, 194), and consists of the following principles:—(1) That the American continents are henceforth not to be considered as subjects for future colonization by any European Power: (2) Non-interference in matters exclusively European: (3) That an extention of the European Political system of Allied Powers to any part of the American hemisphere is dangerous to the peace and safety of the United States; that, therefore, with respect to Governments which had acquired independence, any interposition to oppress them or control in any other way their destiny by any European powers would be an unfriendly act; (4) non-interference with the existing colonies of European states: (5) neutrality between a revolted colony and its European mother state.

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Although the doctrine has never been adopted by the Legislature of the United States, and was even rejected by the House of Representatives in 1825, and treated, in 1848, during the discussions on the subject of Yucatan, as being mere declarations, yet on the whole the cabinet, at least, have never failed to wedge it in, whenever an opportunity for doing so has presented itself. Thus in 1843 President Pock opposed the transfer of Yucatan upon the ground of the doctrine. It was asserted again in 1862 and 1865 during the Franco-Mexican war. Upon the same ground the United States contended in 1882, that the Panama canal, if constructed, should be under exclusive American control and in 1889, when the French Government offered financial and official assistance to the Canal Company, the senate resolved that the connection of any European Government with the construction or control of any ship-canal across South or Central America would be regarded with disapproval by the United States. In 1894 it was again applied to the Nicaraguan canal. Last year an attempt was made to bring the Anglo-Nicaraguan indemnity dispute within the purview of the doctrine; and finally

Secretary Olney has determined to extend it further to a boundary dispute. There are grave objections to the doctrine which cannot be over-looked by the European powers whatever may be its value in American eyes. In the first place it is admitted even by American jurists and senators that it is not International Law, but merly a principle of American policy. It cannot therefore be binding upon States that have not given their acquiescence to it expressly or tacitly: and Great Britain has not only not accorded its sanction to it but opposed it in connection with the claims put forward by the United States, under its cover, to exclusive control of the Panama and Nicaraguan Canals in 1882 and 1894, and again last year in connection with the Nicaraguan difficulty. Mr. Olney appears to have appreciated the true character of the Monroe rule in this respect, for he repeatedly speaks of it in his despatch as "a doctrine of American public law" and refrains from putting it on the ground of International law. He seeks to clothe it, however, with the binding nature of a principle of International law upon the ground that it is "well founded in principle and abundantly sanctioned by precedent." But the mere fact that a rule peculiar to a country may be suited to the exigencies of its situation, and may therefore be "well founded" in principle, cannot convert that rule into one of International law. The treatment of Slave Trade as Piracy by some nations was "well founded in principle"; but it was never considered by them that their view was, in consequence, International law, so as to be binding upon the whole world and the fact that it is "abundantly sanctioned by precedent," if it refers to assertions of the doctrine at various times, is of no avail, unless it can be shown against a State that it has expressly or silently recognized it. President Cleveland does indeed attempt to prove, by a syllogism, that it is a part of International law; he says, in effect, that all just claims of States are recognized by that law; that the Monroe claim is just; that therefore the Monroe Doctrine is part of the International Code. In the first place all just claims of States are recognized by International Law only with a proviso that its exercise does not injuriously affect the rights of other States, which it does here; and the second proposition begs the question. There are other objections also to the Monroe Doctrine. The immediate object of its enunciation was the prevention of the execution of the design of the Holy alliance to assist

Spain in the forcible reduction of her revolted colonies. It was said that the American continents having achieved their liberty and established popular forms of Government, European colonization of, or the introduction of the European political system into, any part of the hemisphere would be dangerous to the peace and safety of the United States. The circumstances of the situation were that the Spanish Colonies had but lately thrown off their yoke and the United States herself had done the same only some years before, that republican institutions had not taken such firm root as at present, that territorial divisions were not clearly marked, and that the principles of the Holy Alliance were antagonistic to republican liberty. It was thought that European interference and contiguity in America would be a menace to the integrity of the United States. But it may be a question whether even at that time there was any such danger to the States as to justify the Monroe Doctrine. The Holy Alliance had no idea of subjugating them either for Great Britain or for itself, and the re-establishment of monarchy n the Spanish Colonies would have constituted only a menace to republicanism by moral force which the United States were sufficiently strong to repel. Granting however the existence, at the time, of sufficient reasons for the doctrine, they have now ceased to exist. The times have changed, and under the change of circumstances, there is no valid ground for its assertion now. It is impossible to agree with President Cleveland that a doctrine which owed its existence to a peculiar set of circumstances can continue to exist after the original justifying basis itself has ceased to do so. Europe has ceased to look with cupidity towards the American shores, and indeed, the state of political tension in the old world and the comparative strength of the United States are the best guarantees against aggrandizement in the new. Hence the supremacy of the monarchical principle in South and Central America could not any longer imperil republicanism in the United States. It would be a most humiliating circumstance to them to admit that the founding of a European colony in, or the change of Government of, a South American State, separated by thousands of miles, could now endanger their peace and safety. The reasons advanced by Mr. Olney for the continuance of the doctrine are obviously open to the remark that he himself admits that the dangers foreshadowed from European interference in South and

Central America are only theoretically possible but not probable; and therefore it cannot be permitted to the United States to assert a principle in derogation of International Law upon grounds possible but highly improbable. As to his theory of naturalness of union, it would be a more unnatural union between the united States and Chili, for instance, than between the latter and Spain. Again it does not follow, as a necessary consequence, that colonization of the distant smaller American States by Europe would draw the United States from its attitude of reservo into the vortex of European politics. It does not always follow, even in Europe, that the quarrels between two States *must* affect its neighbours. How the establishment of Monarchy in the distant smaller States could at the present day be "injurious" to the United States, Mr. Olney fails to explain. The United States cannot constitute themselves, notwithstanding their "vital interest in the cause of popular self-government," into self-elected guardians of the popular cause in States far removed, when their own popular forms are not endangered in any way. Nor will his argument founded upon the balance of power, hold water. The United States need fear no alarm on that score. No European Colony could cope with her. As to the Colonies being a base of operations against her, the danger is more apparent than real. The distance of Europe from the Colonies, and the fact that an attack on the United States by land could only commence after the European State had left its base of operations far behind, except in the event of Europe holding Colonies immediately adjoining the United States deprive this contention of any serious force. Moreover, if Colonies are to be feared as bases of military operations, such bases already exist in the case of European States having present possessions. The true ground upon which the United States resent European influence is a desire to monopolize all the material advantages which can be extracted from the weaker States by reason of her commanding influence on the continent. This is the true and sole basis, at present, of the Monroe Doctrine, and many Americans have frankly admitted it. Mr. Olney himself makes it one of the pillars of the Dotcrine that subjugation of the South Central American States would signify "a loss of all the advantages incidental to their natural relations to us." The position of the United States, stripped of all unreal arguments is:—"I am the strongest American State. I am both desirous

and able to extract all the commercial and political advantages possible from the smaller Republics, and you shall have no share. The only way to secure this, is the advancement of the Monroe doctrine.* The speeches delivered on the occasion of the Fourth of July Celebration, last year, by respectable men like Campbell Ex-Governor of Ohio, Ex-Senator Ingalls of Kansas, and Senator Lodge of Massachussets and the views of writers like Captain Mahan and Gossip give ample indication of this attitude of the United States. That no European State could assent to a doctrine when founded on a basis which regards American rights exclusively and ignores their own, goes without saying.

If the Monroe doctrine is to be admitted at all, it must be placed upon its original foundation, and cannot, therefore, apply to the construction or control of an American canal or a boundary dispute between a European and an American State. It could be extended to embrace these questions only upon the new and untenable ground of interference with the exclusive material interests of the United States. It has been admitted by the Washington Foreign Office that the doctrine has no application to disputes between the mother country and a colony: nor to a voluntary transfer by an American State (as in the case of Yucatan in 1848): nor to European intervention by means of hostile occupation or war, when the object is reparation for injury and not a forcible change of constitution, or permanent control of destiny or acquisition of territory (as in the cases of France and Mexico in 1862 Spain and Chili in 1865, and recently, in the cases of France and San Domingo, and Great Britain and Nicaragua). The construction of or control over a canal is not a "colonization," nor is it an "extension of the political system of Europe" and the arrangement of its neutrality, in the event of war, would obviate any danger to the peace or safety of the United States. It cannot by any reasoning the construction fall within the terms of the original doctrine. No doubt it would be very advantageous for the United States to hold the exclusive control of such an undertaking in her power, but this arrangement would be injurous to the interests of European States, which are of as great importance to them as the interests of the United States to her.

Nor can a *bona fide* boundary dispute come within the purview of the doctrine; so far from being a new colonization, it is a claim to

territory as part of an existing colony. There is no introduction of an European political system attempted, within the meaning of the Monroe message in such a case. But it is argued by Mr. Olney and President Cleveland that the acquisition of the disputed territory by Great Britain imports a corresponding loss on the part of Venezuela, and that, therefore, as regards that portion, the political system of England is introduced, and, as this is done against the will of Venezuela, it is tantamount to a forcible trajection of a foreign political system within the Monroe Doctrine. The fallacy of this argument is obvious. The Monroe Doctrine relates to forcible imposition of an European political system over an area which admittedly does not belong to the aggressor State. Here, Great Britain claims the disputed regions as her own, and only seeks to extend her system over her own possession. To hold, as Messrs. Olney and Cleveland do, that Great Britain is extending her system to Venezuelan soil, is to assert that the disputed area belongs to Venezuela —a conclusion which they at the same time, inconsistently, maintain. they cannot assume. Further, how can it be said that the assumption by Great Britain of these lands is "dangerous to the peace and safety" of the United States? The essence of the Monroe Doctrine is the "danger to the peace and safety" of the Great Republic which was supposed by President Monroe to arise from European contiguity. Is the Republican Government of Washington likely to be overturned by the event? Is popular liberty in the United States in danger of subversion by the acquisition of this territory on the part of Great Britain? But says Mr. Olney, "the political control at stake is of no mean importance, but concerns domains of great extent, and if it also directly involves control of the Orinoco, is of immediate consequence in connection with the whole river navigation of the interior of South America." Assuming it is so, it is a matter that concerns only the States through which the Orinoco passes. It could only concern the United States, if it was proved that their peace or safety was imperilled. It is not even pretended that it is so. Nor can the United States take up the matter on the ground of weakness of the other States except on the ground of danger to its own peace. The adoption of the rolé of a self-constituted champion of the rights of others, when your own are not attacked, is not a proceeding warranted by International Law. The only cause which the United States could at all advance

for interference would be loss of exclusive material interests in respect of the territory absorbed by Great Britain. This argument too has been put forward, but they could only hope to sustain it on the ground that the Law of Nations had conferred upon them the exclusive right to or a vested interest in the advantages accruing from Venezuelan soil—a proposition which would be manifestly absurd.

As to the alleged right of the United States to know whether an encroachment by Great Britain has taken place or is going on, it is to be observed that this right is only a sequel to the right of interference, and that when no ground has been made for the justification of interference, the consequential right fails. The right to decide the question for itself, when the other Power is unwilling to furnish the information, stands in the same position as the right to inquire.

In conclusion, while the United States have not intervened in the quarrel on valid international grounds, and while the dispute is a fit one for arbitration, Great Britain should endeavour at the same time to set at rest the spirit of President Monroe for ever by attaching a condition that the United States should agree to throw into the crucible of arbitration the much vexed doctrine enunciated in the celebrated message to Congress.

E. H. MONNIER.

NOTES OF INDIAN CASES.

Pateshuri Partap Narain Singh *v.* **Bhagwati Prasad,** I. L. R., 17 A, 578. The Allahabad High Court is clearly right in holding that where a debt is advanced from the funds of a joint Hindu family and is due to it, no certificate is necessary to enable the survivor to recover the debt, even though it does not appear on the face of the bond that the funds were those of a joint family. In its anxiety to afford protection to debtors, the Madras High Court has been led into imposing restrictions which are not warranted by the act. There is no reason why the courts should not apply the ordinary presumption of Hindu Law that the members of a Hindu family are joint *prima facie.*

Narindra Bahadur Pal *v.* **Khadim Hussain,** I. L. R., 17 A, 581. Two propositions are laid down by the Full Bench in this case with regard to interest *post diem* which seem to be open to doubt. (1) That interest allowed under the Interest Act XXXII of 1839 in a suit

for the recovery of mortgage-money does not constitute a charge on the land and the Court has no power to pass a decree for sale in respect of such interest. (2) That interest cannot be allowed under the Interest Act after the lapse of six years from the due date. We have already discussed the subject and expressed our views and it is therefore unnecessary to do so again, see I. M. L. J., 582. The Madras High Court has also recently taken the same view as that laid down in Allahabad (see *Thayar Ammal v. Lakshmi Ammal* I. L. R. 18 M. 331).

Subhudra *v.* **Basdeo Dube** I. L. R., 18 A 29. It was held in this case that where an order is made by a Magistrate for the maintenance of a wife under S. 488 of the Civil Procedure Code, the order cannot be superseded by a decree of the civil court declaring that the wife has no right to maintenance. The provisions of the Criminal Procedure Code are intended to confer a summary remedy on wives whose maintenance has been wrongfully refused by their husbands. If the wife fails before the Magistrate she is not precluded from bringing her claim before the civil courts and seeking to obtain an adjudication in her favour. We do not see why the husband who feels aggrieved by a summary order against him, under S. 488 should not also have the question of his liability determined by the civil courts. The more correct view appears to us to be that laid down by the Madras High Court (Weir 1187) that if in disposing off a suit, a Civil Court decides any matter which might have the effect of disentitling a wife to maintenance, a magistrate who has awarded maintenance is bound in the interests of justice to take the judgement of the Civil Court into consideration before again enforcing his order for maintenance.

Muhammad Husen Ali khan *v* **Thakur Dharam Singh**, I. L. R., 18 A, 31. The distinction drawn by Mr. Justice Banerji between mortgager who purchases the mortgaged property subject to a mortgage held by himself and a mortgagee who purchases the mortgaged property with the leave of the Court in execution of a decree obtained on his mortgage is clearly right. In the latter case the mortgagee must be treated like any stranger who may happen to purchase the property and should not be held bound to give credit for the market value of the property, if it should be greater than the price realized at the auction.

Ghulam Shabbir *v* **Dwarka Prasad**, I. L. R., 18 A 36. The Allahabad High Court is in conflict with the Madras High Court in regard to the question whether a dispute between a decree-holder-purchaser and a Judgment-debtor about delivery of possession is or is not a question between the parties to the suit. The Madras

High Court holds, it is a matter falling under Section 244 of the Civil Procedure Code, while the Allahabad High Court thinks it is not, (see, *Muttha v. Appasami* I. L. R. 13 M. 504). We are disposed to agree in the Madras view that it is desirable to prevent matters in execution from becoming the cause of fresh litigation and that the beneficial operation of Section 244 should be extended as much as possible.

SUMMARY OF RECENT CASES.

Charitable Gift—Public Gift.

In-re **Nottage-Jones** *v.* **Palmer**. [1895 Vol. II. C. p. 649.]

It has always been very difficult for lawyers and judges to define a charitable gift as distinguished from a merely public gift. The present is rather a test case on the subject. A testator bequeathed a fund in trust to provide annually for ever a cup to be given to the most successful yacht racing. *Lindley, L. J.* and other judges of the Court of Appeal stopped with saying that a gift for the encouragement of a mere sport, though it might be beneficial to the public, cannot be supported as charitable and refused to draw the line between charitable gifts and gifts not charitable. *Kekewich J.* in the first court has attempted to lay down some test for finding out whether a gift is charitable or otherwise. According to him a gift is charitable which is by itself directly, and as its necessary and intended result, beneficial to the community. The benefit of the community must be the direct and not the remote object of the gift. It is difficult to understand what the learned judge means by direct result and remote object. For instance, supposing the testator had said in the present case that his object was to educate men in the management of vessels so that they might become good sailors useful for the defence of the realm, instead of saying, as he actually did, for the purpose of encouraging the sport of yacht racing, would the gift be then charitable?

Interlocutory Mandatory Injunction—Evading service of Writ.

Von Joel *v.* **Hornsey**, [1895 Vol. II. C. D. 774]. The suit was instituted by the plaintiff for the purpose of restraining the defendant from rebuilding his house in the opposite side of the street so as to obstruct the ancient lights of the plaintiff's house. Previous to action brought, the plaintiff gave notice to the defendant that if he went on making additions to his buildings and thus obstruct his ancient lights,

he would sue him in Court. The defendant nevertheless hurried on the building and after the suit was brought evaded the service of summons on him for several days so that the building grew to a great height before substituted service on him was effected.

Held :—(affirming the decision of *Kekewich*) and following *Daniel* v. *Ferguson* (1891-II C 27), that the plaintiff was entitled to a mandatory injunction ordering the defendant to pull down so much of the building as had been erected after he had been warned by the plaintiff that he intended to bring an action.

Landlord and Tenant—Sub-lease—Implied Covenant for Title or for Quiet Enjoyment—Duration of Covenant.

Baynes & Co., *v.* **Lloyd & Sons,** [1895 Vol. II. Q. B., p. 610, C. A. 7]. The Court of Appeal, in spite of considerable conflict of authority, seem inclined to favour the fo lowing rules in respect to implied covenant between landlord and tenant under the English Common Law. In the absence of an express contract to the contrary (1) No covenant either for title, or for quiet enjoyment, is implied in law, from the mere relation of landlord and tenant, but only from certain words used to create the lease, *such as demise concessi.*

2. Supposing any covenant could be implied, it is a covenant for quiet enjoyment only and not for title.

3. Such a covenant is limited and not absolute, that is, it avails against the lessor and those that come under him by title, and not against strangers.

4. And lastly such covenant expires with the determination of the lessor's interest even though it may determine during the term.

The defendants being in possession of certain premises as lessees for a term, of which eight years and a half still remained unexpired, sub-let the premises for a term of ten years and a half to the plaintiffs, acting under a mistake but in good faith, and put them in possession. There was no express covenant either for title or for quiet enjoyment, nor did the words of the letting include the word *demise.*

On the expiration of eight years and a half the plaintiffs were evicted by the superior landlord. The plaintiffs then brought a suit for damages for breach of a covenant for title and for quiet enjoyment.

Held :—Affirming the decision of *Lord Russell* of *Killowen C. J.*, [1895 Vol. I., Q. B. 820,] that the plaintiffs could not recover.

Damages—Contract—Breach of Warrant—Remoteness.

Mowbray and Another *v.* **Merry Weather**, [1895 Vol. II., Q. B. p. 640 C. A. 7.] This is a case in which it is very doubtful whether the expression '*natural consequence*' has not been given an interpretation beyond its natural limits.

The Plaintiffs were stevedores and they were discharging Cargo from a certain steamship. The defendants had undertaken to supply the plaintiff all necessary cranes, chains, and other gearing reasonably fit for that purpose. He failed to do so and supplied a chain which was so defective that it broke whilst it was being used and seriously injured one of the plaintiff's workman. The defect in the chain was such that the plaintiffs could, with the exercise of reasonable care, have detected it. The injured workman sued the plaintiffs and the action was compromised by the latter by the payment of a sum of money. The plaintiffs then sued the defendant for damages for breach of warranty and contended that they were entitled to get, not merely the nominal damages, but also the amount which they had paid to the injured workman.

Held:—*affirming the Judgment of Charles J.* (1895 Vol. I Q. B. 857) that the plaintiffs were entitled to recover the sum claimed. The plaintiff's liability to pay the workman was the natural consequence of the breach of warranty on the part of the defendants. Natural consequence means a consequence which might reasonably have been supposed to have been in the contemplation of the parties.

Per Rigby, L. J.—The effect of the warranty is that the defendant agrees with the plaintiffs that they may rely on him for the sufficiency of the chain as a matter of contract, and as between him and them there was no duty on their part to examine the chain to see whether it was sufficient.

Riparian owner—alluvium.

Hissedson *v.* **Ashby** [1896 Vol. I Ch. Div. p. 78 Per Romer Justice.] —Where a nontidal river gradually enlarges its bed and thereby adds lands to or takes it away from one side, the rule that the riparian owner on that side, enjoys the gain or has to bear the loss, applies not only where two different persons own the opposite banks, but also where the river bed belongs to a separate owner and not to the riparian owner

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Solicitor—order striking off the rolls—Suit on such order.

Godfrey *v.* **George** [I 1896 Vol. I Q. B. p. 48 C. A. 7.]—A Solicitor was struck off the rolls for misconduct in appropriating to his use money belonging to his client, and an order was passed by the court, ordering him to pay the costs of his client. The client brought an action upon the order.

Held:—That the suit would be against the Solicitor. There are two modes of procedure, open to the client; he might attach the defendant for disobeying the order, or he might bring an action upon the order. He may pursue both the remedies, and unless his claim is satisfied by means of one of them, he is not prevented from pursuing the other.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Green Bag for January (*in exchange*).

The Brief for December (*in exchange.*)

Harvard Law Review for January (*in exchange,*)

The Allahabad Weekly notes for December (*in exchange,*)

The Educational Review for January (*in exchange.*)

Serjeant Arabin, who in the days of Serjeant Ballantine was a Commissioner of the Central Criminal Court, was a Judge who unintentionally caused much amusement to the frequenters of the old Bailey. "Prisoner at the Bar," he once said, "if ever there were a clearer case than this of a man robbing his master, this case is that case."—*The Brief.*

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On another occasion the learned Commissioner solemnly delivered himself as follows: "Prisoner at the Bar, you have been found guilty on several indictments, and it is in my power to subject you to transportation for a period very considerably beyond the term of your natural life; but the court, in its mercy, will not go as far as it lawfully might go, and the sentence is that you be transported for two periods of seven years each."—*The Brief.*

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Dr. Johnson on law and Lawyers.—A friend of Dr. Johnson once said that he was like a ghost, who never spoke until he was spoken to—the truest description of him, the Doctor said, ever given; and it is to the initiative of the inquisitive Boswell, of course—the admiring showman—

that we owe the Doctor's dicta on law and lawyers. Boswell was going to the English bar or rather playing at it and a gay friend, he said, had advised him against being a lawyer, because he would be excelled by plodding blockheads, (By the way did not this brilliant contemner of blockheads move once for a writ 'Icnare adhaesit pavimento ?') 'Why, sir,' said Dr. Johnson, 'in the formulary and statutory part of the law, a plodding blockhead may excel, but in the ingenious and rational part of it a plodding blockhead can never excel.'. 'You must not indulge,' went on the Doctor "in too sanguine hopes should you be called to our Bar. I was told by a very sensible lawyer that there are a great many chances against any man's success in the profession of the law. The candidates are so numerous, and those who get practice are so few." He said it was by no means true, that a man of good parts and application is sure of having business, though he indeed, allowed that if such a man could but appear in a few causes his merit would be known, and he would get forward; and that the great risk was that a man might pass half a lifetime in the courts and never have an opportunity of showing his abilities. This is as much a melancholy truth to-day as it was a hundred years ago. 'What means may a lawyer legitimately use to get on ? Nice questions of casuistry arise. 'A gentleman,' says Boswell, told me that a country man of his and mine, Wedderburn—afterwards Lord Loughborough—who had risen to eminence on the law, had when first making his way solicited him to get him employed in city causes.

Johnson: Sir it is wrong to stir up law suits; but when once it is certain that a lawsuit is to go on, there is nothing wrong on a lawyer's endeavouring that he shall have the benefit rather than another!

Boswell: 'you would not solicit employment, sir, if you were a lawyer?

Johnson: 'No, sir, but not because I should think it wrong, but because *I should disdain it*!

This is a good distinction which will be felt by men of just pride.

He proceeded: 'However, I would not have a lawyer to be wanting to himself on using fair means, I would have him to inject a little hint now and then to prevent his being overlooked.'

This is a very tolerant view of professional etiquette. When the great Duchess of Malborough called at young Murray's chambers and found him out—we may presume he was engaged in drinking champagne with the wits—the imperious dame said, on meeting him next: 'young man! if you want to rise in your profession you must not sup out. Boswell had an uneasy feeling that he must give up supping out, and

he put it to Johnson whether a very extensive acquaintance in London might not be prejudicial to a lawyer.

Said Johnson: Sir, you will attend to business as business lays hold of you. When not actually employed you may see your friends as much as you do now, you may dine at a club every day and sup with one of the members every night and you may be as much at public places as one who has seen them all, would wish to be; but you must take care to attend constantly in Westminster Hall, both to mind your business, as it is almost all learnt there, (for no body reads now), and to show that you want to have business. And you must not be too often seen at public places, that competitors may not have to say, "He is always at the play house or Ranelagh, and never to be found at his chambers." And then sir, there must be a kind of solemnity in the manner of a professional man, I have nothing particular to say to you (Boswell) on the subject. All this I should say to any one. I should have said it to Lord Tharlow twenty years ago.' This point about solemnity of manner recalls a saying of Horne Tooke. He once remarked to a serious and successful friend, 'we have reversed the ordinary laws of nature You have risen by your gravity; I have sunk by my levity.'

Sir Matthew Halle once said that it was as great a dishonor as a man were capable of that he should be hired for a little money to say otherwise than he thought. But the truer and juster view of the ethics of advocacy is well expounded by Johnson.

'We talked of the law. Sir William Forbes said he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one.

'Sir,' said Dr. Johnson, a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, Sir, what is the purpose of the Courts of Justice? It is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client mightly fairly do for

himself if he could. If by a superiority of attention, of knowledge, of skill, and a better method of communication he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.

Boswell feared that the affectation of warmth in a client's cause might produce habitual dissimulation.

'Why, no, sir, a man who is paid to tumble—the metaphor is not flattering to the lawyer—will not go on tumbling when he is not to be paid for it.'

Lawyers cultivate the diffuser graces of rhetoric. They are sometimes accused even of garrulity. 'It is unjust, sir,' said Johnson, to censure lawyers for multiplying words when they argue. It is often necessary for them to multiply words. This (he said, referring to some point) 'you must enlarge on when speaking to the Committee (of the House of Commons). You must not argue there as if you were arguing in the schools. Close reasoning will not fix their attention. You must say the same thing over and over again in different words. If you say it but once they miss it in a moment of inattention.'—*The Law Journal.*

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Teaching in the Universities.—The following memorandum on law-teaching in the Universities, prepared by Prof Gowdy of Oxford, has the general assent of the Professors and Readers in the Faculty of law, reserving further consideration as to the details of the suggested curriculam which are given provisionally by way of illustrating the application of the principles laid down.

'The universities can only with propriety undertake the teaching of law on its *theoretical* side. For practical training it is necessary that the student should attend the courts and work in a barrister's or a solicitor's chambers, and provision for this practical training should be made by the Inns of court and the Incorporated Law Society.

For every law student (I speak of those who attend a University) there ought to be an examination at the close of his academic study, success in which should be rewarded by a degree and by admission to the second stage in his education—the practical training, and at the close of the latter he should if successful be admitted to the Bar or to practise as a solicitor, as the case may be.

The evil of the present system is that the theoretical and practical study are not kept distinct. The lectures and professional examinations in London are a medley of both. Consequently, a student acquires his knowledge in an unsystematic and piece-meal fashion, and begins his professional work under great disadvantages.

What is meant by theoretical training? I think it should embrace a study of the following topics and that three years should, if possible, be given to it under some such arrangement as follows :—

First year, Roman Law and jurisprudence. As regards this, there should be no doubt. Modern Law can only be understood with any thoroughness by entering at the portals of Roman Law and jurisprudence. A whole year should be devoted to them : less would be useless, and they should be studied exclusively. To take up these subjects in the middle or towards the close of the curriculum, as so many do, is but to confuse the mind and immensely increase the labour of the student.

Second year, History of English Real Property, English Common Law and International Law.

Third year, Constitutional law, outlines of equity and criminal law.

At the end of the three years, the normal student should have a fair knowledge of these topics, and should be examined in them for his degree. Stress, however, should be principally laid upon Roman Law, Jurisprudence, History of English Law and Constitutional Law ; the other topics cannot be expected to be known except in any elementary way.

As regards the non-university student, evidence of the same course of study at College and Law-schools should be required, but the cost of University Education is now so moderate, and the wealth of the middle classes so much increased, that it may well be a question whether a University degree should not be insisted on, as is done in France, and Germany, in every case. At any rate this might be done if a teaching University with an efficient faculty of law were created in London.

As to the practical training---Two years should be devoted to this in a barrister's or a solicitor's chambers as the case may be. At the end of this period it may be a question whether the student should be examined by the Inns of Court or Incorporated Law Society in practice, pleading conveyancing, and also more thoroughly than at his first examination, in common law and equity.

At present no practical training seems to be required for admission to the bar ; it is left to the candidate's option, and apparently not more than one half of the entrants (if so many) attend Chamber's. What the Universities, with much reason complain of is that the honor degrees in

law which they have conferred are not (except as regards Roman Law) accepted by the Inns of Court and Incorporated Law Society, as sufficient evidence even of theoretic knowledge. These professional bodies do not say that their own examinations demand a higher standard of proficiency; on the contrary, it is well known that they are considerably easier [*i.e.*, than the *honour* examinations at the Universities. There is no question of asking the Inns of Court to recognize any other]. Any one who will take the trouble to compare the papers set for the B. C. L. degree examinations at Oxford with those set for the Bar Examinations will see that the former are vastly more testing, and yet not even the B. C. L. is accepted. The consequence is that students are harassed by preparing for examination in theoretical subjects, after they have left the Universities and should be devoting themselves to practical work, and the University teaching receives hardly any recognition:—*The Law Quarterly Review.*

No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply the element.

This is the principle established or reaffirmed by the House of Lords in the *Mayor &c., of Bradford V. Pickles* 95 A. C. 587, 64, L. J. ch. 759 and expressed by Lord Macnaughter in the words above quoted (95 A. C. at p. 601)

One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But if the first person uses the persuation with intent to injure the person with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful.

This is the principle expressed in the words of Lord Esher, which is established or reaffirmed by the Court of Appeal in *Flood V. Jackson* 95, 2 Q. B. (C. A.) 21, 38, 64 L. J. Q. B. 665 and on which we believe the House of Lords will shortly be called on to give a final decision.

The following result would appear to ensue. The malicious use which has regard to property is not in itself an abuse and illegal; but the malicious use of a right which has no reference to property is or may be an abuse, and is or may be, illegal. As regards the exercise of the one class of rights, motive is irrelevant; as regards the exercise of the other class of rights, motive is, or may be, material.

No one need assert or maintain that this state of the law is either absurd or unjust, for it is open to any one to argue that the motive of a person who exercises his rights may in some cases be a matter which does not, and in other cases matter which does, require consideration. But no one can deny that the present state of the law has about it an air of paradox. And at last some lawyers who have thought a good deal about these questions will hope that the pending appeal to the House of Lords in *Flood* v. *Jackson* may be successful.—*The Law Quarterly Review.*

Photography in Medical Jurisprudence. — Photograph especially with the aid of the microscope and Photomicrograph, are now of enormous value in the detection of crime.

The eminent chemist, Dr. Joserich, of Berlin, has acquired international fame as a scientific expert in detecting crime by the aid of Photography and the Microscope. His most remarkable crime was in testifying that a small white hair found on the body of the murdered girl, was not the hair of the accused man, but of a dog, because the pith extended nearly the whole width of the shaft, unlike human hairs, and he swore that the hair was from an old, yellow, smooth-haired and comparatively short haised dog. The accused was acquitted and suspicion later falling on another, it was ascertained that he had a dog answering the description, and on pursuing the investigation the actual murderer confessed his crime.

In another case, where two men were arrested, charged with the murder of a woman, and Dr. Jeserich examined the hairs found on the clothes of the accused, and compared them with the hair of the murdered woman, Dr. Jeserich was enabled to demonstrate that one of the hairs was taken from the murdered woman's head. The point of the hair had never been cut and the shaft and root coincided. He found that the hair found on the other suspect was the man's own hair. The guilty one was convicted on Dr. Jeserich's evidence, and in corroboration of his wonderful accuracy the murderer confessed his crime before execution.

In another case of homicide, where the crime was committed with an axe, the murderer declared that he had killed a goat with the axe eight days before the homicide.

The blood found on the axe was examined by the microscope and contrasted with the blood of a goat and the two thrown up by photography. The paper in this number of the *Journal* by prof M'C. White, illustrates the difference between the red blood corpuscles of a man and a goat.

Dr. Jeserich says in that case, that the axe had been wiped after the deed. This he reproduced by photomicrography, and exhibited it in court, showing, greatly magnified, a point on the slot of the axe, where the streaks, caused by wiping had been reproduced,

In the detection of forgeries, photography now plays an important part. By the use of coloured sensitive plates, difference in ink can be readily traced and identified, even when it would not show at all on an ordinary photograph.

Prof Marshall D. Ewell has been able te detect forgeries in writings by the microscope and the photograph.

The system of identification of criminals, that Paul Berillon has introduced iu Paris and in other places, relies much on photography to complete and perfect the system of authrometric measurements.

The finger impressions on putty, used by burglars, in removing panes of glass railing or banisters, newspapers, photographed and compared with the finger prints of those suspected frequently, lead to detection, and if dissimilar, to discharge.

Considerable interest has been aroused by the assertion that a photograph of the eye of a victim will reproduce the image lost upon the retina before or at the moment of death.

There is no authentic case of this character reported, but Professor Exmer, of Vienna, has produced a photograph taken from the eye of a dead beetle.

The object of the experiment was to ascertain whether the faced eye, projected one or many images on the retina. The method was as follows: The eye of the beetle was dissected from the body and placed on the side of the microscope. Then he directed the side toward the window of the laboratory on the pane of which he had pasted the letter R. The photograph prof. Exmer thus obtained, shows the outlines of the window in white, with the sash and panes, and the letter R is perfectly reproduced, and through the window in the photograph is the indistinct and hazy figure of a church in the distance.

A very interesting paper appears in the *Strand Magazine*, London, for January, by Wm. G. Fitzgerald, which is noticed and some of the cuts reproduced in the March 2, 1895, number of the Literary digest. —*The MedicoLegal Journal.*

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Prescriptive Right to Compel repairs:—A somewhat startling proposition in the law of easements is laid down in the case of Whitten for *Manufacturing Co.* v. *Staples*, 41 N. E. R. 441 (*Mass*,) *Field*, *C. J.*

Holmes and *Lathrop*, *JJ.*, dissenting. It is to the effect that, in consequence of payment by owners of land for more than twenty years of an annual sum of money toward the repair of the dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annualy. The decision is based on the analogy of the duty to repair a dam to the duty to repair fences and highways. The primary conception of an easement is a right to use another's land: It is a burden imposed upon the land itself, and gives the owner of the easement a right *in rem.* The duty of the owner of the servient estate is the same as that of all other members of the community, merely to refrain from interfering with the use of the easement. Unfortunately, the law has allowed a land owner to acquire by prescription, or by grant, certain rights, which are not accurately rights in the land of another compelling a passive duty of non—interference merely, but are rights compelling postive acts by *dominus* of the servient estate.

In these cases, the land is not subjected to use, but the owner, by reason of holding the land, is compelled to do positive acts. A right to compel the performance of positive acts is known as a spurious easement: and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoyment of an existing easement (*Ryder* v. *Smith*, 3 T. R. 766); and repairs to be made upon the highway by abutting owners (*Bac: Abr*; *Highways, E.*) It is doubtful if the last mentioned right was ever recognised in the United States previously to the decision in recent case *Middlefield* v. *Knitting Co.*, 160 Mass. 267. The question in the principal case concerns the extension of these exceptional easements, There are two strong objections. In the first place, the analogy between repairs on a dam situated on the land of a stranger and repairs to fences and highways is not complete. In each of the spurious easements noted above, acts are to be done on the servient estate; or at least, in each case the act to be done is closely bound up with the use of his land by the owner of the servient estate. But, aside from this imperfect analogy, the creation of rights in the nature of easements-varying widely, however, from the primary conception of easements, that of a subjection of the land itself—has gone far enough. It is to be regretted that such rights—anomalies at best-were ever allowed to creep into the law; and on principle they ought not to be extended beyond their present well defined limits. It is conceivable perhaps, that strong reasons of public policy would justify the extension which the court tries to make in the present case; but *Field*

C. J., in his dissenting opinion, forcibly replies to arguments of this nature that "Secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, ought not to be extended." With authority and reasons of public policy against the decision, it has little left to support it.

The Massachusetts court would certainly support a covenant to pay this money even though in so doing, it would probably go beyond the doctrine of *Savage* v. *Mason*, 3 cush 500. There, the covenant was to pay for the privilege of using a party wall, and was connected, it would seem, with the enjoyment of an easement, in this case, a right to retain the wall on land of the covenantor and his assigns.—*Harvard Law Review.*

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Waiver of Constitutional Right to Twelve Jurors.—The Supreme Court of New Mexico has just decided that the United States constitutional guaranty of a jury trial in all criminal prosecutions cannot be waived by one indicted for a felony, so as to make valid a trial by eleven jurors. *Territory* v. *Ortiz*, 42 Pac. Rep. 87.

Most of the American State constitutions contain similar guaranties which have been generally interpreted to prohibit statutes compelling the defendant to submit to trial by any number of jurors less than twelve. As regards the defendant's ability to waive this right, the authorities are divided. Although in minor offences the defendant is generally allowed to waive the right even in the absence of statutes permitting it, he is not allowed at common law to waive the right in case of felonies; and statutes permitting waiver of the right in such case are in some States held unconstitutional. Nowhere is waiver of this right permitted in capital cases.

One argument suggested against allowing the defendant to waive his constitutional right to a trial by a full panel has been that the State is concerned to preserve the lives and liberties of its citizens, and therefore it will not suffer them to consent to a form of procedure that may lesson their chances of acquittal. *Cancemi* v. *People*, 18 N. Y. 128. But in *Comm* v. *Dailey*, 12 cush, 80, Chief Justice Shaw, points out that in any particular case the defendant's chances of success in a present trial with eleven jurors may be greater than in a future one with twelve, as where certain evidence is now available that may not be in the future; and that the defendant and his counsel can be safely trusted not to prejudice his interests. Judge Cooley contends, however, upon better ground, that a tribunal of less than twelve jurors is unknown to the law; that it amounts merely to a species of arbitration to decide whether the accused has been guilty of an offence against the State. Cooley, Const. Lim,

(6th ed.) 391. The finding of such a tribunal, not constituted according to law, is of course shorn of legal effect. Bulwarked by this reasoning, the result of the principle case and kindred decisions seems fairly impregnable.—Harvard Law Review.

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THE RIGHT TO PRIVACY—THE SCHUYLER INJUNCTION.—The case of *Schuyler* v. *Curtis*, before noticed in its earliest stage in 5 Harvard Law Review, 148, has been fully adjudicated by the Court of Appeals of New York in favour of the defendant. The bill was for an injunction to prevent the defendants from completing a statue of a deceased lady of whom the plaintiff was the nephew and step-son, and from displaying it first at the World's Fair under the title of "The Typical Philanthropist," and then in the rooms of the Ladies' Art Association in New York. Mr. Justice Peckham in dismissing the bill took especial care to say that the decision could not be taken as a denial of the right to privacy, or of that altogether independent right which the next of kin of a deceased person might have in the privacy of that person's past life, and he put the decision upon the ground that in the case in question there were no circumstances which gave the plaintiff good reason to pray for an injunction. The reasoning was that the deceased could not have shrunk from the anticipation of a publicity after her death, however much she might have done so, had it been attempted during her life, and that consequently no evidence of her desire to avoid publicity could be relevant to the plaintiff's case. Further and in general the Statue was not to be used in any way which could give a "sane and reasonable person," any complaint on his own account, though he were her nearest relative.

Reduced to its formal parts the decision would therefore seem to be a denial only of equitable jurisdiction, and not of the plaintiff's legal right. It may be fairly said that the Court admitted that a tort was proposed by the defendant, but found no sufficient reason for giving the extraordinary remedy of a Court of Equity, and left the plaintiff to his remedy at law. The case is quite new in its particular features, since the injunctions previously granted, e. g. against the reproduction of photographs, publication of letters, and the like, were all cases where the defendant proposed to give a publicity for his own profit, regardless of whether it was calculated to do honor to the plaintiff or not. Moreover, this was a case where equitable jurisdiction cannot be said to flow necessarily from the facts, as in the case of a proposed tort to land, but is rather analogous to a bill for the recovery of a chattel in specie, depending upon its particular circumstances for equitable jurisdiction. In the exercise of its discretion in cases of this sort, a Court has such latitude that it is impossible, or at least presumptuous,

to say it has come to a wrong decision unless that be obviously absurd and unreasonable. So in this case the decision of the Court must be held to be justified even by those who might disagree with the result, had it been their place to decide the case, for there is surely nothing preposterous or absurd in saying that here the plaintiff's loss could be sufficiently compensated by money damages.

But the reasoning of this Court, with all respect to the learned Judge who delivered the opinion, is not altogether satisfactory. Since the question before them was not to be governed by the decisions of the Lower Court, and their position was not that of reviewing the decision of independent tribunal, *e.g*, the verdict of a jury, there was no occasion to hold that no "sane and reasonable person" could uphold the decison of the Lower Courts, and it was a statement which their very unanimity in combination with the vigorous dissent in the Court of Appeals itself ought to have effectually disproved.

Further, the line of reasoning by which the plaintiff's evidence of the deceased's dislike of publicity was excluded as irrelevant to his own proof of damages, can be assented to with difficulty. It is surely a mistaken view of the ordinary facts of human feeling to say that a naturally retiring person can tolerate the anticipation of a publicity after his death from which he would shrink painfully during his life. Surely a person to whom privacy is of any value whatever must contemplate a future publicity with almost as much chagrin as a present one. Could the learned Judge, for example, bear for an instant the thought of a public representation or description of his courtship after his death ? Now if this is so, the knowledge of how great annoyance would have been caused to the deceased, had she had knowledge of the defendant's proposition, was a very material element in the plaintiff's damages, for surely it is a source of pain to every normal person to know that that is contemplated which would have caused suffering to any one dear to him, who is now dead. Indeed, it is unnecessary to give proofs of that feeling—they are so obvious.

Finally, the case seems a good instance of the ill effects of the loose system of pleading used in New York. It is doubtful whether the decision would have been received by the press in general, as it has been, as a denial of the right to privacy, were the Jurisdictions of Law and equity distinguished, and certainly it would have been more easily limited to its proper scope. As has been intimated, it cannot fairly be complained of, however much some of the reasoning of the opinion may seem to need further exegesis to gain acceptance.—*Harvard Law Review*

Torts—Unfair Competition—Fraudulent Simulation.—Plaintiff has built up a large trade for his store, known as the "Mechanic Store." Defendant, a competing trader, moved his establishment to a building adjoining plaintiff's, and labelled his store the "Mechanic store." Plaintiff on his lot put up a building of very distinctive appearance in which he continued his business. Defendant on his adjoining lot erected a building exactly similar to plaintiff's, as regard the appearance of the lower-stories. In using the name "Mechanical Store," and in erecting his building, defendant intended to and did induce the public to buy of him, thinking they were trading with plaintiff. *Held,* defendant would be enjoined from using the name "Mechanical Store" and would be required to distinguish his store from plaintiff's, *Weinstock v. Marks.* 42 Pac. Rep. 142 (Cal.)

The result reached in the principal case, an eminently satisfactory one from all stand points is fully sustained by the authorities cited in the well reasoned opinion by Garoutte J. "Manufacturers have no right to beguile the public into buying their wares under the impression they are buying those of their rivals." Brown, J. in *Coats v. Merrill Thread Co.* 149 U. S. 562 at 566. In *Pierce v, Guitard* 66 cal. 68, 8 Pac. Rep. 645, a defendant was enjoined from using an imitative label, *Schmidt v. Brieg,* 100 Cal. 672, 35 Pac. Rep. 623 *Semble.* As pointed out in the opinion, defendant's liability must be the same whether he has pirated plaintiff's trade by the use of an imitative lable or an imitative store front. *Harvard Law Review.*

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Property.—Application of Maxim Pendente Lite Nihil Innovatur.—Plaintiff brought a bill to recover land on the ground of fraud and set out the facts on which he relied to show fraud. Later an amendment was allowed setting out additional facts to show fraud. On these additional facts plaintiff obtained a decree. Between the time of filing a bill and its amendments, defendant conveyed to a third party who had notice of the facts relied on under the original bill and being satisfied that those facts were insufficient to show fraud, had purchased the estate. *Held,* as the amendment did not change the subject matter of the suit, but merely specified additional matters on proof of the same ground of recovery i,e. fraud, the suit was the same throughout and the doctrine of *lis pendens* applies. *Turner* v. *Houpt* 33 Atl Rep 28 (N. J).

The court begins by remarking that the maxim of *lis pendens* is not based on inplied notice to all the world of the facts which constitute the grounds of the suitor's claim, but is only notice of the existence of a suit in regard to the matter in dispute, and that where the suit is in regard

to property, people purchasing the property do so at their peril as to the result of the suit. Pomeroy, 2 Eq Jur ss 632 and 633, and cases cited. It follows from this, that the purchaser's notice of the facts to establish fraud in the bill as originally filed in the case at bar, and his reliance on them are immaterial as regards the doctrine of *lis pendens* and that the vendee bought *pendente lite*, as the insertion of further allegations of the same character as those put in the original bill did not alter the identity of the suit as to the parties, subject matter, or purpose, and consequently that the suit under which plaintiff won was the same as that pending at the time of the purchase of the land *Gibbon* v. *Dougherty* 10 Ohio St 365.—*Harvard* Law *Review.*

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Persons—Divorce—Extreme cruelty—Mental suffering. The plaintiff petitioned for a divorce from her husband for extreme cruelty. The cruelty alleged was his commission of sodomy with a beast. *Held* that such conduct was entreme cruelty, as tending to cause mental suffering that would affect the health, and exciting apprehension of the communication of disease. Divorce granted. *Anonymous* 2 Ohio, Nisi Pr 342.

In the absence of statutory definition, it is generally settled that cruelty sufficient to justify divorce consists of conduct that injures, or may reasonably be apprehended to injure, the physical health of the complainant *Kelly* v. *Kelly* L. R 2 Prob and division 31; *Sylvis* v. *Sylvis* 11 col 319 ; 1 Bish. Marr, Div, and Separs. 1563. In some states mere mental suffering not injurious to mental or bodily health is considered sufficient. *Palmer* v. *Palmer* 45 Mich 150. But such doctrine is strongly denied elsewhere. *Bailey* v. *Bailey* 97 Moss 373. When mental suffering is so great that it may reasonably be apprehended to produce physical ill health, divorce ought to be granted, and it is the decision of this difficult question of fact that gives court an opportunity to relax the spirit of the rule while following its letter. The present case, is perhaps an instance of such a relaxation, and is not undesirable. Bnt somewhat *contra* see W—V. W. 141 Mass 495. Compare *Russell* v. *Russell* 11 *The Times* Law Reps 579 noticed in 9 Harvard Law Review, 222,—*Harvard Law Review.*

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Estoppel.—Misrepresentation of boundary by Vendor—Plaintiff bought a lot of land adjoining defendant's lot. In erecting a building thereon, he built up to a line pointed out by defendant as the boundary, but which in fact was several feet within defendants lot. This action is brought in equity to enjoin defendant's interference with his possession, *Held* that though defendant was in " honest error, " he is estopped to

deny the boundary indicated by himself. *Ross et al* v. *Benn et al*, 64 N. W. Rep. 283 (Ia),

This case indicates the present tendency of the doctrine of estoppel. According to the overwhelming weight of earlier authority, no representation estopped its maker unless it was made with knowledge of its falsity or at least when he was "bound to know the true state of things". Bigelow on estoppel 5th ed, chap XVIII Sect 3. In this light, on much the same facts as found in the present case, an opposite conclusion was reached in *Liverpool Wharf* v. *Prescott* 7. Allen 494. Authorities are being formed more plentifully every year in support of the position that wilful falsehood or reckless ignorance is not necessary to create an estoppel; that it is enough if a representation has been made in pure error, on which the other party has been induced to act. Bisphams' Principles of equity 5th ed Ss. 283, 288 and cases cited.—*Harvard Law Review.*

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Deputy Registrarship in the High Court.—We think, it is a mistake that the Registrar of the High Court and his deputy should both be Civilians. By the very conditions of the service to which they belong, they hold these offices only for a short time. The places serve to them merely as stepping-stones to higher employment. Owing to the shortness of their stay, they never acquire sufficient experience and knowledge of the routine work. The Registrar being the chief ministerial officer of the supervising body of the whole Judicial establishment, has to possess a great deal more knowledge than it seems possible for the temporary occupant of the office to acquire. One of these two offices ought to be a sort of training ground for a District Judgeship, and having regard to the salary attached to the office of Registrar as compared with that of District Judge, we think the Registrar should be a civilian so long as District Judges are civilians. But the Deputy Registrar ought to be a permanent official who will continue to fill the place for a number of years and would be able to give the Registrar the benefit of his experience and moderate the latter's zeal for reform which is often times harmful. As it is, with both the officers as civilians, anxious to signalize their period of service in the High Court by supposed reforms of one kind or another, we ought to prepare ourselves for surprises which cause not a little hardship to the suitors and the profession. We hope the Chief Justice will take this into consideration when the next vacancy occurs, and appoint a professional man, if possible, to the office of Deputy Registrar.

The Allahabad High Court:—The Judges of the Allahabad High Court do not seem to be altogether a happy family. Judicial differences seem generally to lead to personal differences and they seem to be so sharply accentuated that Judicial deliverances are often coloured by them.

Sir Robert Stuart, who was sometime Chief Justice, was bitter against his colleagues for having decided in Full Bench against his view during his absence from India. Sir Comer Petheram and Mr. Justice Mahmood do not seem to have pulled on very well together. Petheram taunted Mahmood with there being no magic in Mohammedan Law, and Mahmood retaliated that he discovered none in any other system. Mr. Justice Mahmood cut up a Judgment of Petheram C. J. into a dozen categorical propositions numbering them *seriatim* and exposing, what he regarded as their logical absurdity. Edge C. J. seems intolerant of dissent and the differences between him and Mr. Mahmood became so serious that they led to a public scandal and the resignation of the latter. One begins to notice a feeling of irritation in some of the judgments of Chief Justice Edge at his colleague Banerji J. venturing to differ from the learned Chief Justice. In *Bhagavan Singh* v. *Bhagavan Singh*, I. L. R. XVII Allahabad 294, Chief Justice Edge in a masterly and otherwise excellent Judgment permitted himself to indulge in unsavoury remarks against Banerji J. insinuating that he was a Bengali, that he did not know Sanskrit did not act properly in consulting Sir Romesh Chunder Mitter the retired Calcutta Judge. And now again in the recent case of *Bhavani Prasad* v. *Kallu*, I. L R, XVI Allahabad p. 37 Chief Justice Edge shows himself incapable of treating difference with respect and manifests considerable irritation in the series of sentences of which the refrain is "we are all agreed." Judicial pre-eminence does not consist in mere learning and research but in a frame of mind which enables the possessor to see the possibility of many sides to a question and to respect honest differences of opinion as alone conducive to the thorough sifting of any question. It is the easiest thing for a colleague to say "ditto" to the learned Chief Justice; but the judgment of the Court loses its value as the judgment of a set of independent and thinking men.

The Sixth Judge.—The niggardliness of government in their treatment of the Madras High Court has been frequently commented on by us. Before another year is over, work will have so far accumulated that the cry for a sixth Judge will swell into a cry for a seventh. There is a section of the Letters Patent which has been altogether ignored by the High Court and by Government. There is an extraordinary original jurisdiction conferred by clause 13 to try suits falling within the juris-

diction of subordinate tribunals and such jurisdiction may be exercised by one or more Judges of the High Court, holding court in any local area in or outside the presidency town. The value of such jurisdiction is immense. Great causes like the Pittapur suit or the Uttumalai suit, are intended to be tried by a Judge of the High Court sitting within the District where the action is instituted. The administration of Justice by a superior tribunal specially created for a great occasion, has an educational value which cannot be easily estimated. Why should this jurisdiction specially conferred by Parliament and the Queen, be completely ignored by the authorities in this country. The answer is that the High Court has not the necessary strength. Is it not more desirable that the High Court should exercise this jurisdiction than that a Judge should be told off to try actions which are artificially valued at a high figure, because there is no stamp to be paid for that luxury, and which 75 per cent. of the Munsifs in this country try with efficiency. In a country like England whose geographical area is much smaller, Judges in the position of the Lord Chief Justice of England carry justice almost to the door of the litigant. The inferior financial condition of this country may be a reason for our not imitating that example in entirety but the principle is sound and if the ideal of justice were as high in this country as it should be, we could have no difficulty in convincing the authorities that the power conferred by the Letters Patent should at once be exercised in great causes which arise in the country. The argument for a sixth Judge in Madras is unanswerable, looked at from every point of view.